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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,
Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,
Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, defendants herein and applicants for the allowance of an appeal to said Supreme Court, respectfully represent that the basis upon which they contend that said Supreme Court has jurisdiction upon appeal to review the final judgment and decree of the District Court entered in this cause on November 7, 1949, is as follows:

I

The Statutory Provisions Believed to Sustain the Jurisdiction of the Supreme Court

The jurisdiction of the Supreme Court to review by direct appeal the above mentioned judgment and decree is con-

ferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; Title 15 U. S. C. Sec. 29), and by Title 28 U. S. C., Sec. 1253. The time for such appeals is now fixed by Section 2101 (b) (60 days), embodying the same time limitation formerly appearing in Title 15, Sec. 29. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal:

United States v. *United States Gypsum Co.*, 333 U. S. 364;

United States v. *Yellow Cab Co.*, — U. S. —, decided December 5, 1949, No. 22 October Term, 1949;

United States v. *California Cooperative Canneries*, 279 U. S. 553.

Section 2 of the Expediting Act requires that the appeal be taken to the Supreme Court. No court other than the Supreme Court has jurisdiction. An appeal under said Expediting Act (15 U.S.C. Sec. 29) is of right and is not an exercise of the Supreme Court's discretionary jurisdiction. (*United States* v. *Yellow Cab Co., supra.*)

Appeal lies when the trial court fails to give effect to, or misconstrues, the mandate of the reviewing court.

Baltimore & Ohio Railroad Company, et al. v. *United States*, 279 U. S. 781;

United States v. *Urbuteit*, 336 U. S. 804;

In re Sanford Fork & Tool Co., 160 U. S. 255.

In *Baltimore & Ohio Railroad Company, et al.* v. *United States, supra,* the Supreme Court said:

> "When a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this court, either upon a new appeal or by writ of mandamus."

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In *United States* v. *Urbuteit*, 336 U. S. 804, the Supreme Court granted certiorari and determined whether or not the court of appeals had failed to follow the mandate of the Supreme Court on the first appeal (335 U. S. 355).

II

The Statutes Involved

The case involves the so-called Sherman Act. The pertinent provisions of Sections 1, 2, 3, and 4 of that Act (Act of July 2, 1890, 26 Stat. 209, as amended; 15 U. S. Secs. 1, 2, 3 and 4) are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such con-

tract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, * * *.

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violation. * * *.

III

The Date of the Judgment and Decree and the Date of the Application for Appeal

The judgment and decree sought to be reviewed is a final judgment and decree of the District Court entered on November 7, 1949, after the decision of the Supreme Court reported in *United States* v. *United States Gypsum Company,* 333 U. S. 364. The date upon which application for appeal is presented is January 6, 1950.

IV

Nature of the Case and the Rulings of the District Court

This suit is an equity suit instituted by the United States in August, 1940 in the District Court of the United States for the District of Columbia against United States Gypsum Company and certain other companies and individuals, the latter being officers of the defendant companies, charging them with conspiring to restrain interstate commerce in gypsum board and gypsum products, and with monopolizing, attempting to monopolize, and conspiring to monopolize such commerce in violation of Sections 1, 2 and 3 of the Sherman Act. An expediting certificate was filed under said Expediting Act February 11, 1903, as amended, and a three-judge district court was convened. The

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trial began in November 1943 and the Government's case was closed on April 20, 1944. Thereupon, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, defendants moved to dismiss the case upon the ground that the plaintiff had shown no right to relief. The rule specifically provides that—

> "After the plaintiff has completed the presentation of his evidence, the defendant, *without waiving his right to offer evidence in the event the motion is not granted,* may move for a dismissal on the ground that upon the facts and law the plaintiff has shown no right to relief." (Emphasis supplied.)

On August 5, 1946 the District Court granted said motion and the complaint was dismissed. The appeal by the United States followed and the order dismissing the complaint was reversed on March 8, 1948. The mandate directed that the order be reversed "and the cause remanded for further proceedings in conformity with" the opinion of the Court. The opinion concluded as follows (333 U. S. at pp. 401-2):

> "As the order of dismissal came at the end of the government's presentation on appellee's motion to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure the order is reversed and the case remanded for further proceedings in conformity with this opinion."

Following the remand the case was redocketed in the District Court.

Question then arose as to what the "further proceedings in conformity" with the opinion were which were to be had in the District Court. The specific question was as to whether the mandate construed in the light of the opinion required the entry of a final judgment and decree, then and there, in the Government's favor finding a violation

of the Sherman Act and decreeing appropriate relief, on the ground that the mandate and opinion left no material issue of fact to be tried, or whether under the mandate and opinion the case should proceed to trial with right and opportunity to the defendants to offer their evidence. In order to provide some formality of action whereby the question might be resolved, plaintiff, at the court's suggestion filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motion, as filed, asked, in the alternative, that if such summary judgment should not be entered in plaintiff's favor upon the whole case or for all of the relief asked, and if a further trial should be necessary, the court should direct such further proceedings as should be just. Also, the court requested defendants to file proffers of proof, which proffers were subsequently filed.

On June 29, 1948, the court (Judge Stephens dissenting) announced its ruling to the effect that the motion for summary judgment would be allowed. Plaintiff was directed to submit its decree within 120 days thereafter.

On November 7, 1949 the judgment and decree herewith appealed from was entered.

V

The Questions Are Substantial

It was the view of the majority judges of the District Court that the mandate of the Supreme Court in the light of the opinion left nothing for the District Court to do except to enter judgment against the defendants finding a violation of the Sherman Act without affording the defendants any right or opportunity to introduce any evidence in their own defense. The mandate of the Supreme Court of course ran to the District Court and not to the parties and it was therefore necessary that the District Court

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determine what "further proceedings" were to be had which would comply with the mandate. Whether the District Court erred in its conclusions in that regard is of course reviewable by the Supreme Court as pointed out under Point II above.

The complaint charged that defendants violated both Sections 1 and 2 of the Sherman Act by conspiring to fix prices on patented gypsum board and unpatented gypsum products, to standardize gypsum board and its method of production for the purpose of eliminating competition, and to regulate the distribution of gypsum board by eliminating jobbers and fixing resale prices of manufacturing distributors (Compl. par. 45(a) to (e); Op. 367). Generally speaking, as it has frequently asserted, plaintiff charged that the defendants entered into an unlawful combination and conspiracy to blanket the industry under patent licenses and stablize prices, in violation of the Sherman Act.

The answers of the defendants denied all the charges made in the complaint and in these proceedings defendants offered to introduce evidence in support of their denials.

Notwithstanding defendants' denials and offers of proof, plaintiff, on its motion for summary judgment, contended that no genuine issue of fact remained in the case. It was contended that the Supreme Court in its opinion reversing the order of the trial court dismissing the complaint had decided that all these issues were conclusively determined against the defendants. Obviously this could not be, since the only question before the Supreme Court was that of whether the plaintiff had established a *prima facie* case of conspiracy. It is fundamental upon such a record that defendants are entitled to have their day in court under the Fifth Amendment to the Constitution.

The Supreme Court in its opinion held that the industry-wide license agreements entered into with knowledge on

the part of licensor and licensees of the adherence of others with the control over prices and methods of distribution through the agreements and bulletins were sufficient to establish a *prima facie* case of conspiracy (333 U. S. 389), and having so determined concluded that the declarations and acts of the various members, which had been rejected by the trial court as not binding on the other defendants, became admissible against all as declarations or acts of co-conspirators in aid of the conspiracy (Op. 393).

Plaintiff referred to Section V of the opinion to support its assertion that the Supreme Court had decided the issues conclusively against the defendants and pointed particularly to the language used therein to the effect that "it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices * * * despite the assumed legality of each separate patent license" (Op. 401). Plaintiff construed this language to mean that the court held that a mere plurality of licenses among competitors in an entire industry with price limitation adhered to by each of them with knowledge of the adherence of the others was, without more, a violation *per se* of the Sherman Act. In other words, plaintiff contends that the Supreme Court held that such a mere plurality of patent licenses in an entire industry, even though the result of arm's length bargaining, and where the parties in the negotiation and execution thereof were acting in the utmost good faith, nevertheless constituted a violation of the Sherman Act and was wholly without the protection of the doctrine laid down in *United States* v. *General Electric Company*, 272 U. S. 476 (1926).

Having so construed the language, plaintiff urged that concert of action in that respect being the gist of the of-

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fense, it had, upon it motion for summary judgment, only to establish its existence without any issue as to a material fact and that all of the other abuses normally constituting a violation of the Sherman Act could be laid aside; that for purposes of the motion it was not essential to show those other violations; and that if price control alone were shown there was a case and that it was the Government's intention to ask for summary judgment on that basis (Tr. 7814-15)[1]. In the first place, no such construction is warranted by anything said in the opinion since, as stated above, there was nothing before the court but the question of whether the plaintiff had made a *prima facie* case, nor is the language used open to any such construction. Furthermore, as shown by the charges in the complaint and the denials in the answers, there were other issues of fact outside of the main issue in the case which could not have been conclusively determined by any such construction.

The trial court nevertheless, by a majority vote, construed the opinion of the Supreme Court to hold that the defendants acted in concert to restrain and monopolize trade and commerce in the gypsum board industry in violation of the Sherman Act, and that it was therefore required under the Supreme Court's mandate to grant the motion for summary judgment, and entered the decree here complained of.

We see nothing in the language used in the opinion which would warrant such a construction. The Supreme Court, in Section III, having concluded that the industry-wide license agreements entered into with knowledge on the part of licensor and licensees of the adherence of others, were sufficient to establish a *prima facie* case of conspiracy (Op. 389) and admitted the declarations against all (Op. 393), proceeded in Section IV to set aside certain of the finding of the

[1] Transcript references are to the stenographic report of the arguments of counsel before the court after the remand of the case.

trial court as clearly erroneous (Op. 393-9). In stating that it was unnecessary to determine whether other findings of the trial court were erroneous, the Court went on to say that "Enough has been said as to the findings and the evidence • • • to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling" (Op. 399). In Section V, wherein plaintiff pointed particularly to the language that it would be sufficient to show concert of action under the patent licenses, the Court said that what we have said in Section III on the validity of the arrangements (a *prima facie* case) is applicable here (Op. 399-400). The Court, in the same section, in the very paragraph in which the concert of action theory so much relied upon by plaintiff is found, summed up the conspiracy which it deemed to have been established *prima facie* by the license agreements and price bulletins in view of the other evidence adduced by the Government, including the declarations above referred to (Op. 400-401).

That the Supreme Court would undertake to make such a ruling in a case which involved only the question of whether plaintiff had made a *prima facie* case and where, upon reversal of the order of dismissal the defendants were entitled to introduce their defense and have their day in court, is not to be contemplated. It is also a fact that in *United States* v. *Line Material Company*, 333 U. S. 287, the court refused to repudiate the doctrine long adhered to in *United States* v. *General Electric Company*, 272 U. S. 476, but on the contrary held that the adjustment between the lawful restraint of trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act, has reached the point that a patentee may validly license a competitor to make and vend with price limitation under the rule of the *General Electric* case (333 U. S. 310). The court found in that case that the licenses were the result of

arm's length bargaining and that in the negotiations and execution of the licenses the defendants were acting in good faith but reversed the judgment of the trial court upon the sole ground that two or more patentees with competitive non-infringing patents could not combine among themselves by a cross-licensing agreement under which prices were fixed upon the devices produced under the patents without violating the Sherman Act (333 U. S. 292-9, 305-15). In the instant case the Supreme Court in its opinion distinguished the *General Electric* case upon the ground, as shown, that there was a *prima facie* case of conspiracy to blanket the industry under patent licenses and stabilize prices in violation of the Sherman Act as charged in the complaint. Obviously, under this ruling the issue remains to be finally determined upon a trial of the whole case, and the mandate of the court did not contemplate a judgment against the defendants without an opportunity to be heard.

When it came to the entry of a decree, notwithstanding their position when they argued their motion that it was the Government's intention to ask for summary judgment on the basis of the plurality of license theory and that the other abuses could be laid aside, as aforesaid, counsel for plaintiff said that the Supreme Court having held there was a *prima facie* case of conspiracy, the defendants were conclusively bound thereby and must therefore be held to have associated themselves in a plan to blanket the industry and stabilize prices, as set forth in paragraph 45(a) to (e) of the complaint (Tr. 8266, 8268-71); that the *prima facie* case including the declarations had now become conclusive (Tr. 7998, 8018); and that the plurality of licenses industry-wide was not the conspiracy in the case (Tr. 8272). To say the least, this is a startling statement and is inconsistent with the contention of plaintiff above mentioned with respect to the concert of action theory under a plurality of licenses.

The Supreme Court in its opinion never held that the defendants were conclusively bound by the *prima facie* case without having an opportunity to introduce their evidence and be heard upon the issues raised by their answers, as contended by counsel, nor is there anything in the opinion of the court to warrant any such suggestion.

It would indeed be a most unusual situation for a trial court, after listening solely to the plaintiff's case to enter judgment at that point for the plaintiff and to deny the defendants any right or opportunity to be heard in the way of the introduction of evidence. It is not conceivable that the Supreme Court so intended or that it thought that the conspiracy was established from plaintiff's evidence standing alone even including those facts not controverted by defendants, to the point that defendants should not be permitted to introduce their evidence or that the issue as to the conspiracy was forever foreclosed by its decision, leaving to the District Court only the bare necessity of entering judgment against the defendants without further hearing.

Judge Stephens, in his dissenting opinion stated that he thought that in setting aside the trial court's findings of fact and in saying that "by the record now presented" violation of the Sherman Act is clear and in saying that as the order of dismissal came at the end of the Government's presentation on defendant's motion to dismiss under Rule 41(b) "the order is reversed and the case remanded for further proceedings in conformity with this opinion," the Supreme Court meant that the defendants' evidence should be heard and the case disposed of by the trial court upon the merits, on the issues raised by the complaint and the answers, and upon findings of fact and conclusions of law to be made anew after a weighing of all of the evidence. In this connection he said it was his view not to be thought

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that the Supreme Court contemplated denial to the defendants of their day in court upon the issues raised by the pleadings, but that is the effect of the summary judgment; that the defendants have made offers of proof but they are not to be permitted to present their evidence.

On the question of whether a mere plurality of licenses in an entire industry with price limitation adhered to by each of the parties with knowledge of the adherence of others, constituted *ipso facto* a violation of the Sherman Act, he said:

> "• • • It is true that it is without dispute in the case that patent licenses with price fixing limitations were executed by the defendants, that these licenses were, in the large, adhered to by each defendant with knowledge of the adherence of others, and that they were industry wide; and these undisputed facts were adverted to by the Supreme Court in the course of its opinion ruling that a *prima facie* case of conspiracy to violate the Sherman Act had been made out by the Government. But I do not read the opinion of the Court as ruling that such a plurality of patent licenses is, without more, conclusive, rather than merely *prima facie*, evidence of a violation of the Sherman Act. Had the Court regarded such a plurality of licenses, without more, as conclusive evidence of a violation of the Act it would I think have overruled *United States* v. *General Electric Company*, 272 U. S. 476 (1926). This it did not do either in its decision in the instant case or in *United States* v. *Line Material Co.*, 333 U. S. 287 (1948) • • •"

In the entry of the judgment and decree of November 7, 1949, without affording any hearing to the defendants, the District Court wholly ignored the express provisions of Rule 41(b) whereby a defendant does not waive his right to introduce evidence in the event his motion under the rule for a dismissal of the complaint is overruled. If a defend-

ant does not lose his right to introduce his evidence in the event his motion under the rule is overruled in the first instance by the District Court, it is not apparent why he should be in any worse position merely because he was successful in the District Court and the order dismissing the complaint is subsequently reversed on appeal.

It has been uniformly held by several of the courts of appeal that where a motion under Rule 41(b) is allowed by the trial court and the order granting the motion is subsequently reversed on appeal, the defendant has a right to proceed with his defense.

Federal Deposit Insurance Corporation v. *Mason*, 115 F. (2d) 548;

Bowles v. *Biberman Bros.*, C. A. 3, 152 F. (2d) 700;

Gulbenkian v. *Gulbenkian*, C. A. 2, 146 F. (2d) 173;

Bach v. *Friden Calculating Machine Co.*, C. A. 6, 148 F. (2d) 407.

In the *Federal Deposit* case the trial court granted defendants' motion for a dismissal of the complaint under Rule 41(b). Upon appeal the order was reversed. The court likened the procedure under Rule 41(b) to that under Rule 50 applying to jury actions, and said (p. 552):

> "It is thus seen that if the defendants' motion had not been granted by the district court they would have been entitled to proceed to offer evidence in their defense. Since we now hold that the order granting their motion was erroneous and must be reversed it follows that the Civil Procedure Rules require that the defendants now be afforded an opportunity to offer their evidence."

The court accordingly directed the District Court to proceed with the trial of the case as though the defendants' motion for dismissal had not been granted.

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In the *Bach* case above, the court discussed at some length the procedure to be had with respect to Rule 41(b). The court said (p. 410):

> "It is clear it was intended by adoption of the rules to relieve the defendant in an equity case of the risk of having his proof cut off if he failed on a motion to dismiss at the conclusion of plaintiff's evidence • • •."

And further (p. 410):

> "• • • If the trial court committed error in this respect, on reversal the defendant clearly would have the right to proceed with the introduction of his evidence under the rule. Any other construction would lack common sense."

In *Lee* v. *State Bank and Trust Co.*, C.A. 2, 38 F. (2d) 45, a case which arose prior to the promulgation of the present Rules of Civil Procedure, the complaint was dismissed at the close of the plaintiff's evidence. The question was discussed at some length by the court as to the propriety of such a motion in an equity suit. It was said (p. 49) that if the motion was granted and the decree dismissing the bill on the merits is reversed on appeal "a gross miscarriage of justice may result, if a decree for plaintiff be entered without giving defendant an opportunity to go forward with his evidence." Obviously rule 41(b) sets at rest the question whether the defendant may introduce his evidence if his motion is overruled by the trial court. But while the rule itself does not expressly deal with the right of the defendant to introduce evidence if his motion is allowed by the trial court but the order dismissing the complaint is reversed on appeal it would seem clear that the defendants' rights in the matter of introducing his evidence is the same whether his motion is initially denied

by the trial court or whether it is allowed by the trial court and the order allowing the motion is subsequently reversed by the appellate court. And so the cases above cited hold. We have found no decision to the contrary.

The Supreme Court in its opinion in this case referred to the *Gulbenkian* case to the effect that it was unnecessary for the Government to offer its evidence a second time. (333 U. S. p. 402, footnote 20.) The relevancy of the court's statement in that regard is not apparent unless the court had intended that the case should be further heard in the District Court as required by the said rule.

In the view of the District Court the opinion left no material fact to be tried, just the same as if the case had been fully tried in the District Court and the whole of the evidence taken, and the case was before the Supreme Court for final decision, which would conclude both parties. But if that had been the intention of the Supreme Court in its present opinion the Supreme Court would undoubtedly have specifically directed the entry of a decree. That the District Court was in error in its interpretation of the opinion of the Supreme Court seems to us to be almost self-evident. The opinion does not state, or even intimate, that the Government had established its case to the point that defendants were to be given no right to introduce their evidence. The opinion states in so many words that the industry-wide license agreements entered into with knowledge on the part of the licensor and licensees of the adherence of others, with control over prices and methods of distribution through the agreements and the bulletins established a *prima facie* case of conspiracy. (333 U. S. at p. 389.) The "declarations" and other acts of the various members, so much relied upon by the Government and by the Supreme Court, were held admissible as against all of the parties to the asserted conspiracy only because, it was said, plaintiff had

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established such *prima facie* case. (333 U. S. at p. 393.) Even the license agreements, etc., together with the declarations and other acts were not held by the court to establish a case of the violation of the Act so as to preclude any evidence on the part of defendants. Numerous other portions of the opinion clearly indicate the Supreme Court's view that it was passing upon the Government's case from the standpoint of the Government's evidence alone. Referring to the numerous findings of the District Court and to what was said to be the erroneous view of the District Court with respect to the *General Electric* case, it was said as above stated that enough had been said as to the findings and the evidence to enable the District Court "to pass upon the facts that may come before it on further proceedings in accord with our present ruling." (333 U. S. at p. 399.)

We submit that it is quite clear from the opinion of the Supreme Court that that court intended, upon reversal of the order of August 5, 1946 dismissing the complaint under Rule 41(b), that the case should go back for the completion of the trial and the taking of such further evidence as should be offered by the parties, just as if defendants' motion under the rule had been denied by the District Court in the first instance—leaving it to the District Court upon the conclusion of the whole case to make new findings of fact and state its conclusions of law in the light of the opinion on the first appeal.

The majority judges handed down no formal opinion in connection with the entry of the judgment and decree of November 7, 1949. However, the transcript of the hearing before the court on June 29, 1948 indicates the views of the majority judges. We therefore append to this statement, in conformity with Rule 12 of the Supreme Court, a copy of the transcript of the hearing so stating such views, in-

cluding also the remarks made at the time by Judge Stephens. A copy of Judge Stephens' dissenting opinion is appended hereto, together with a copy of the judgment and decree of November 7, 1949.

Respectfully submitted,

ALBERT R. CONNELLY,
CRANSTON SPRAY,
HUGH LYNCH, JR.,
Attorneys for defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

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APPENDIX "A"

Excerpt from Transcript of the Hearing Before the Court on June 29, 1948, stating views of the Judges on Plaintiff's Motion for Summary Judgment. (Tr. 7934 to 7942, inclusive).

Chief Justice Stephens: We will take a recess for ten minutes, gentlemen, and reconvene and, if possible, make some announcement as to when we can reach a conclusion upon this motion for summary judgment.

(Recess: 4:27 p. m. to 4:47 p. m.)

Chief Justice Stephens: The Court thinks it need give no further consideration to the motion for summary judgment than it has thus far given. It has heard the arguments and considered them carefully and has read the proffers and various other papers presented and is ready now to reach a decision.

The Court is in division on the motion for summary judgment. Judge Garrett and Judge Jackson have different views from those of myself, and I will ask them each to state briefly their views, and then I will state mine.

Judge Garrett.

Judge Garrett: I have studied the proffer of proof very carefully in the light of the motion for summary judgment and in the light of the argument made in the briefs.

It is my opinion that if everything should be testified to, which is in the proffer of proof, it would not bring any change in the decision of the Supreme Court on the fundamental question involved.

I do not care to go into any detail about the matter. Of course it is very well known my judgment was different originally, but the Supreme Court has spoken, and I am unable to see wherein there is any loophole through which there may be a conclusion different from that reached by the Supreme Court upon the fundamental question.

Hence, I think the summary judgment should be granted, but I take the precaution to say that the decree following the summary judgment, if it comes or when it does come, must be examined with great care because it should not

include matters which were not in issue before the Supreme Court.

That, I think, is all that I have to say.

Chief Justice Stephens: Judge Jackson.

Judge Jackson: Judge Garrett's reasoning parallels mine. I, too, feel that if everything were proved by witnesses on the stand that is stated would be attempted to be proved in the offer of proof, that still there would be no genuine issue of a material fact. There is no sense in going to great length to explain my view. I agree with Judge Garrett. I have read very carefully the briefs, listened with attention and an open mind to the arguments, but I just can't understand how I could come to any other conclusion in view of the decision of the Supreme Court.

Chief Justice Stephens: I have a different view from my colleagues. I think the same issues and genuine issues of fact which were in the case at the outset are still in the case. The issues which arise from paragraphs 44, 45 and 46 of the plaintiff's complaint and of the defendant's answers denying the allegations therein.

I think the opinion of the Supreme Court clearly contemplates further proceedings in this case. It says on page 33 of the slip opinion just above Topic 5:

> "It may be that in the light of this opinion the District Court will conclude that many such findings are no longer significant in reaching its decision. As to others a different result will be required. Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling."

That, I think, is a clear indication by the Supreme Court that further proceedings were contemplated by it to be held by the Trial Court.

As to the balance of the opinion of the Supreme Court, while it is difficult to be clear as to just what it means on the topic of legality or illegality of the plurality of licenses, I cannot bring myself to believe in reading the

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opinion several times carefully that the Supreme Court has intended to rule that a mere plurality of licenses with price-fixing provisions is illegal.

I think, therefore, that the Supreme Court would not warrant our denying the defendants a right to try to prove that that was all there was in the instant case.

I do not see how we can assume to say that the defendants will not be able to prove to the satisfaction of the Court the correctness of the findings of fact which it has already made. Putting this otherwise, I think the whole of the opinion in the Supreme Court must be read in the light of the proposition that the Supreme Court was passing only upon the question whether or not a prima facie case had been made.

I do not think it intended to rule that a complete case had been made. If so, it could itself have ordered a decree. I think the defendants are entitled to try by introducing evidence to convince the triers of fact that the allegations in paragraphs 44, 45 and 46 of the complaint are not true.

I think that to grant summary judgment at the present stage of the case is to deny to the defendants the guarantee of the due process clause of the Constitution of its day in court on the issues raised by its answer.

I do not think the Supreme Court contemplates any such denial.

That states my views briefly.

With respect to a decree, since I am now in the minority, I shall have to defer to the views of my fellows as to this suggestion.

It occurs to me, Mr. Steffen, in view of the victory you have now so fully won, that you might be able to content yourself with a decree which reflects the views of my colleagues on the subject of conspiracy to execute and take patent licenses for the purpose of organizing the industry and stabilizing prices, and on the subject of monopoly, and that you might not need to trouble yourselves or the Court with the difficulties about jobbers and high prices and arbitrary prices of the patented board or with respect to unpatented materials or with respect to standardization or with respect to manufacturing distributors.

I should think you might be able to waive those points, if you get a decree, which you will now get, holding the entire licensing system illegal.

Now, of course, we can't compel you to do that, but I suggest that as a matter for your consideration; and if you come to a different conclusion, then I think my colleagues will have to meet the issue of how they are going to draw a decree on those five topics which are the subject of paragraph 45 of the complaint without a hearing granted to the defendants on their denials of the charges on those subjects.

Mr. Steffen: If Your Honors please, we will be glad to have possibly 90 days in which to study over the matter of the findings and also to take up in some measure the nature of the proposed decree. We do not want to hurry in this, and we would not like to be pressed to agree now to any particular findings, but after studying it thoroughly, we will then, as in the last case, submit——

Chief Justice Stephens: I wouldn't suggest a present commitment, of course. I do have this to suggest: that while I disagree with my colleagues in their views, I think one of the practical results of their views, which might be desirable, is that if the defendants see fit, as I assume they will, to appeal from this ruling, we then may get a speedy determination by the Supreme Court as to what this opinion means on the subject of plurality of licenses and the legality thereof.

It would seem to me that it would be to the interest of the Government, which wants to stop what it claims to be an illegal combination, to get its decree in here as soon as possible so that the defendants can proceed to appeal as soon as possible.

So I would suggest that you take as little time as is reasonably necessary for preparing a proposed decree.

Judge Jackson: Be sure that time is sufficiently long, though, so that some of us Judges can get out of this climate. I am not going to work this summer if I can help it. I am sick of it.

Mr. Steffen: We want at least 90 days.

Chief Justice Stephens: Is there any objection to 90 days for the preparation of the proposed decree, any objection by the defendants?

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Mr. Steffen: Mr. Knuff says he would prefer 120 days. I might say this: that I am in charge of a case in New York against the Investment Bankers. I come here occasionally, and Mr. Knuff has been carrying the load and it will be largely his load over the summer.

Judge Jackson: Let us not fix a definite date, then, but get it out as conveniently as you can without killing yourselves, but have it accurate.

Mr. Steffen: That is right.

Chief Justice Stephens: It seems to me it would be better to set some time limit. If the defendants do not object, let's make it 120 days. Any objections by the defendants to 120 days?

Mr. Bromley: No, Your Honor.

Chief Justice Stephens: Make it 120 days from today to present the proposed decree to the Court and to adverse counsel.

Mr. Steffen: That is proposed findings of fact.

Chief Justice Stephens: Proposed findings of fact, decree, or any other papers you feel you are obliged to have signed by the majority of the Court under this motion for summary judgment and the granting thereof.

Does anyone think of anything else that ought to be disposed of at this time?

Mr. Bromley: May I have the last thing read that you said, Judge? I wasn't listening, I am sorry.

Chief Justice Stephens: I said that the defendants, not objecting, the Government would be allowed 120 days from today within which to file with the Court and serve upon the defendants and their counsel its proposed decree, findings of fact, and/or other papers which it may feel itself under the legal duty of presenting in order to effectuate the ruling of the Court on the motion for summary judgment.

Mr. Bromley: I should like the record to show that I except to the ruling of the Court made this day.

Chief Justice Stephens: May it so show.

The Court will be in recess until 120 days, so far as this case is concerned.

(Whereupon, at 5:00 o'clock p. m. an adjournment was taken sine die.)

United States v. *United States Gypsum Company, et al.* Civil Action No. 8017, District Court of the United States for the District of Columbia.

OPINION BY STEPHENS, J., ON MOTION FOR SUMMARY JUDGMENT

STEPHENS, *J.*: I think that the entry of a summary judgment against the defendants is not warranted. The case was before the Supreme Court for review of the correctness of the trial court's mid-trial dismissal, under Rule 41 (b), Federal Rules of Civil Procedure, of the Government's complaint. The dismissal was after the Government had completed presentation of the evidence which it relied upon to sustain the charges in its complaint, but before any evidence had been presented by the defendants. As I read its opinion the Supreme Court determined that the Government's evidence established *prima facie* the violations of the Sherman Act, or some of them, charged in the Government's complaint. But these charges—outlined in paragraphs 44-46 (a) inclusive, and detailed in paragraphs 47-123 inclusive, of the complaint are denied by the defendants' answers.[2] Hence there remain in the case genuine issues

[2] The charges reduce themselves in essence to the following: (1) That the license contracts entered into between the defendant USG, as licensor, and the other defendants, as licensees, are themselves illegal as in restraint of trade in view of the nature of the patents upon which the contracts are based, in view of the fact that USG and the plurality of defendant licensees manufacture all of the gypsum board in the "Eastern area," and in view of the terms and conditions of the contracts, including those providing for the establishment of minimum prices on patented gypsum board to be made and sold by the defendants. (2) That the license contracts, even if valid on their face, were not entered into as bona fide license agreements, reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were executed by the defendants merely to give color of legality to a combination to restrain trade, by control of the prices and terms and conditions of sale of gypsum board, plaster, and miscellaneous gypsum products throughout the gypsum industry. (3) That the defendants' operations were carried beyond the proper limits of a patent monopoly and licensing thereunder by raising and fixing at arbitrary and non-competitive levels the price of gypsum board made and sold by the defendants, by improper standardization of gypsum board and its method of production, by raising, maintaining and stabilizing the level of prices of unpatented materials—plaster and

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of material fact. This forbids the entry of a summary judgment for under Rule 56 (c), Federal Rules of Civil Procedure, such a judgment can be rendered only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." And I think that in setting aside the trial court's findings of fact and in saying that "By the record *now presented*" violation of the Sherman Act is clear and in saying that, as the order of dismissal came at the end of the Government's presentation on defendants' motion to dismiss under Rule 41 (b), "the order is reversed and the case remanded *for further proceedings in conformity with this opinion*,"[3] the Supreme Court meant that the defendants' evidence should be heard and the case disposed of by the trial court upon the merits on the issues raised by the complaint and the answers and upon findings of fact and conclusions of law to be made anew after a weighing of all of the evidence, *i.e.*, that to be presented by the defendants as well as that which had been introduced by the Government. It is in my view not to be thought that the Supreme Court contemplated denial to the defendants of their day in court upon the issues raised by the pleadings. But that is the effect of the summary judgment; the defendants have made offers of proof but they are not to be permitted to present evidence. It is true that it is without dispute in the case that patent licenses with price fixing limitations were executed by the defendants, that these licenses were, in the large, adhered to by each defendant with knowledge of the adherence of others, and that they were industry wide; and these undisputed facts were adverted to by the Supreme Court in the course of its opinion ruling that a *prima facie* case of conspiracy to violate the

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miscellaneous gypsum products—by effectuating improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products, and by fixing the prices at which manufacturing distributors resold gypsum board. (4) That the patents, or some of them, upon which such license agreements were purportedly based are invalid.

[3] *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 401, 402 (1948); italics supplied.

Sherman Act had been made out by the Government. But I do not read the opinion of the Court as ruling that such a plurality of patent licenses is, without more, conclusive, rather than merely *prima facie*, evidence of a violation of the Sherman Act. Had the Court regarded such a plurality of licenses, without more, as conclusive evidence of a violation of the Act it would I think have overruled *United States* v. *General Electric Company*, 272 U. S. 476 (1926). This it did not do either in its decision in the instant case or in *United States* v. *Line Material Co.*, 333 U. S. 287 (1948). In the latter case the Sherman Act violation found by the Supreme Court was laid by it to the cross-licensing of the Lemmon and Schultz patents, not to the admitted plurality of licenses with price fixing provisions entered into, as the Court said, as the result of arm's length bargaining although with knowledge on the part of each licensee of price provisions in the licenses of others.

I think therefore that the defendants should be permitted to present their offered proof on the issues of fact raised by their answers to the Government's complaint and that the court should then hear argument by counsel for the parties and should, after weighing the evidence of both the Government and the defendants, make findings of fact and conclusions of law anew and then render judgment according thereto.

(S.) HAROLD M. STEPHENS, *J.*

November 7, 1949.

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APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, *Plaintiff*,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAINTEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; and FREDERICK TOMKINS, *Defendants*

PRELIMINARY STATEMENT

This cause came on for trial before this Court on November 15, 1943. At the conclusion of plaintiff's presentation of the case, defendants moved, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for judgment dismissing the complaint on its merits. The motion of defendants was granted August 6, 1946. The judgment so rendered by this Court was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 364).

Following the remand, the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moved for summary judgment in its favor upon the pleadings and all of the proceedings which theretofore had been had in the case, or, in the alternative, for such further proceedings as this Court might direct, and defendants, by direction of the Court, filed proffers of proof.

Argument by counsel for the respective parties upon the motion of plaintiff was heard by the Court, and after due consideration of such argument and of defendants' proffers of proof, Garrett, J. and Jackson, J., constituting

a majority of the Court, announced a ruling to the effect that plaintiff's motion for summary judgment would be granted, and Stephens, J., who presided during the trial, announced his dissent from such ruling.

Thereafter counsel for plaintiff and counsel for certain of the defendants submitted forms of final decrees for the consideration of the Court and also suggested findings of fact, the latter to be considered in the event the Court should deem it necessary to make any findings of fact additional to those originally found by it and to those stated in the opinion of the Supreme Court.

In due course, the Court heard arguments respecting the proposed decrees and the suggested findings of fact, and full consideration has been given thereto and to all prior proceedings—all being considered in the light of the decision of the Supreme Court which, as understood by the majority of this Court, held that the defendants acted in concert to restrain trade and commerce in the gypsum board industry and monopolized said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States, which section embraces all the states of the United States westward from the eastern coast thereof to the Rocky Mountains and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

Decree

The motion of plaintiff for a summary judgment is sustained and in conformity with the decision of the Supreme Court, as understood by the majority of this Court, and in obedience to its mandate, it is ordered, adjudged and decreed:

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

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ARTICLE II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. The "Patents" shall mean United States Letters Patent and applications for United States Letters Patent owned by defendant United States Gypsum Company which are described in the Patent Licenses, as hereinafter defined, and continuations in whole or in part, renewals, reissues, divisions, and extensions thereof.

3. "Gypsum board" shall mean plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the Patents.

4. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American

Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized Board);

Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated February 2, 1937, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

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Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United Gypsum Company, as licensor, and Newark Plaster Company, as licensee (perforated lath), and any supplement or amendment to any of said patent license agreements.

ARTICLE III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Anti-trust Act.

ARTICLE IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the anti-trust laws of the United States and illegal, null and void.

ARTICLE V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them or any of them are hereby enjoined and restrained from

(1) the further performance or enforcement of any of the provisions of the Patent Licenses, including any price bulletin issued thereunder;

(2) entering into or performing any agreement or understanding among the defendants or any of them for the purpose or with the effect of continuing, reviving or reinstating any monopolistic practice.

(3) entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof.

ARTICLE VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor within 90 days after the effective date hereof, but only in so far as it has the right to do so, a non-exclusive license to make, use and vend under any, some, or all patents and patent applications now owned or controlled by it relating to gypsum board, provided that such license agreement fixes a royalty not to exceed the royalty on the same article or process fixed in the license agreements set out in Article II hereof.

2. Defendant United States Gypsum Company is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which would deprive it of the power or authority to grant such licenses, unless in any sale, transfer or assignment it shall be required that the purchaser, transferee or assignee shall observe the provisions of this section.

ARTICLE VII

Nothing contained in this decree shall be deemed to have any effect upon the operations or activities of said defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this decree.

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ARTICLE VIII

The forms of license agreement which the Court has this day ordered filed herein are hereby approved; and the tender by defendant United States Gypsum Company to each applicant for a license agreement containing the terms and conditions set forth in the applicable filed form or forms shall constitute compliance by defendant United States Gypsum Company with the provisions of Article VI.

ARTICLE IX

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith.

ARTICLE X

Judgment is entered against the defendant companies for 50% of the costs to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows:

United States Gypsum Company	55%
National Gypsum Company	23%
Certain-teed Products Corporation	11%
The Celotex Corporation	3%
Ebsary Gypsum Company, Inc.	3%
Newark Plaster Company	4%
Samuel M. Gloyd, doing busines under the name of Texas Cement Plaster Company	1%

Let the decree be entered .

(S.) FINIS J. GARRETT,
FINIS J. GARRETT J.

(S.) JOSEPH R. JACKSON,
JOSEPH R. JACKSON, J.

STEPHENS, *J.*, dissents from the entry of a summary judgment against the defendants. In his view the defendants should be permitted to present their offered proof upon the issues of fact raised by their answers to the Government's complaint, and the court should then hear argument from counsel for the parties and, after weighing the evidence of both the Government and the defendants, make findings of fact and conclusions of law anew and render judgment according thereto.

(S.) HAROLD M. STEPHENS,

Dated: November 7, 1949.

MAY 29, 1950.

Per Curiam Decisions.

No. 671. UNITED STATES GYPSUM CO. ET AL. *v.* UNITED STATES. Appeal from the United States District Court for the District of Columbia. *Per Curiam:* The appeal is dismissed. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Albert R. Connelly, Cranston Spray* and *Hugh Lynch, Jr.* for appellants.